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In the Supreme Court
OF THE
United States

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OCTOBER TERM, 1969

No. 69-44

LAWRENCE E. WILSON, Warden, California State Prison, San Quentin, California,

Petitioner,

vs.

VERON ATCHLEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI
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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on May 27, 1969.

CITATIONS TO OPINIONS BELOW

The memorandum opinion of the United States District Court for the Northern District of California, printed in Appendix A hereto, is reported at ____ F. Supp. ____. The Court of Appeals' per curiam majority opinion, and Judge Barnes' dissent thereto, are printed in Appendix B hereto, and reported at ____ F.2d ____.

JURISDICTION

The judgment of the Court of Appeals was entered on May 27, 1969 and our petition for rehearing was denied on June 26, 1969. The jurisdiction of this Court is invoked under Title 28, United States Code, section 1254(1).

QUESTIONS PRESENTED

I. Is it proper for a federal district court which cannot say that a confession was involuntary to grant relief on habeas corpus ten years after this very question had been litigated and resolved against petitioner in the state trial court whose decision was affirmed by a unanimous state supreme court and reviewed by this Court?

II. Can a federal district court compel the state courts to act beyond their jurisdiction by invoking the "procedure of convenience" outlined in *Jackson v. Denno* 378 U.S. 368 (1964).

STATUTE INVOLVED

This petition concerns the proper interpretation of Title 28, United States Code, section 2254(d) which is set forth in Appendix C, *infra.*

STATEMENT OF THE CASE

A. Proceedings in State courts.

Veron Atchley was convicted after a jury trial of the first degree murder of his wife, and the death penalty was imposed. Upon appeal to the California Supreme Court his conviction was affirmed in an opinion set forth in Appendix D, *infra.* Subsequently the Governor commuted Atchley's sentence to life imprisonment with eligibility for parole.

B. Proceedings in Federal courts.

Atchley's petition to this Court for a writ of certiorari was granted. However this Court stated:

> "After hearing oral argument and fully examining the record, we conclude that the totality of circumstances as the record makes them manifest did not warrant bringing the case here. Accordingly, the writ is dismissed." *Atchey v. California,* 366 U.S. 207, 6 L.Ed.2d 233 (1961).[1]

He then unsuccessfully petitioned the United States District Court for the Northern District of California

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[1]Petitioner recognizes the general rule that a denial of certiorari is not entitled to persuasive effect in subsequent proceedings [*Brown v. Allen,* 344 U.S. 443, 489-497 (1953)]. However, where as in this case certiorari is withdrawn as having been improvidently granted after briefs were filed and argument heard it must be presumed that the record did not manifest any unfairness at the hearing on the issue of the voluntariness of Atchley's statement.

for a writ of habeas corpus. The district court's denial of that petition was affirmed on appeal. *Atchley v. Dickson,* 338 F.2d 1014 (9th Cir. 1964).

The instant proceedings commenced when a petition for a writ of habeas corpus was filed in the District Court for the Northern District of California on March 10, 1967. An order to show cause issued, counsel was appointed and a supplemental return and traverse were filed. The district court ordered that petitioner be released from custody unless the state affords Atchley either a hearing on the issue of the voluntariness of his confession or a new trial. *Atchley v. Wilson,* ..... F.Supp. ....., Appendix A. We appealed to the Court of Appeals for the Ninth Circuit which in a per curiam opinion affirmed the order of the district court. Judge Barnes dissented. *Wilson v. Atchley,* ..... F.2d ..... (9th Cir. 1969).

STATEMENT OF FACTS

At approximately 2:30 a.m. on the morning of August 3, 1958, Atchley murdered his estranged wife by shooting her six times after lying in wait at her home. Following the shooting he returned to his residence where he was arrested at approximately 4:00 a.m. From the jail Atchley phoned R. J. Travers, his friend and insurance agent who, in accordance with Atchley's request, visited him on the morning of August 5, 1958. At this time Atchley recounted the events surrounding the shooting to Travers. As he was leaving the jail, Travers informed the authorities of the

nature of this conversation and acceded to their request that they be allowed to record the conversation Travers had already arranged to have with Atchley that afternoon.

Before allowing the introduction of a tape recording of this conversation, the trial judge held a hearing in chambers, listened to the tape recording and heard arguments respecting its admissibilty. Objections were made that the statements on the tape recording were not voluntary and were inadmissible because Atchley, when making these statements, was unaware that they were being recorded or that Travers had been requested by Sheriff Spann to elicit them. The trial court ruled that the prosecution would have to establish the same foundation required for the admission of a confession in order to have this recording admitted into evidence.[2]

In the presence of the jury additional evidence was taken on the voluntariness of the conversation and the

[2]At this time California followed the "Massachusetts" procedure for the admission of confessions. The prosecution had the burden of establishing that a confession was voluntary [*People v. Trout*, 54 Cal.2d 576, 583, 354 P.2d 231, 235 (1960); *People v. Berve*, 51 Cal.2d 286, 291, 332 P.2d 97, 99 (1958)]. If the defense offered evidence to controvert the prosecution's, the trial judge had to exclude the confession if he found it had been improperly obtained. If however, the trial judge found the confession to be voluntary it was introduced into evidence.

If the evidence concerning the circumstances surrounding the confession was in conflict [*People v. Bevins*, 54 Cal.2d 71, 77, 351 P.2d 776, 780 (1960)] the jury had to be instructed to disregard any confession they believed was not properly obtained [*People v. Baldwin*, 42 Cal.2d 858, 866, 270 P.2d 1028, 1033 (1954); *People v. Gonzales*, 24 Cal.2d 870, 876, 151 P.2d 251, 254 (1944)]. Where, as in this case, there was no conflict in the evidence as to the circumstances surrounding the confession its admissibility was of course a question of law resolved by the trial court when it admitted the confession into evidence.

tape recording was subsequently admitted. Travers testified that on the evening of August 4, 1958, Atchley had requested that he visit him in jail in order to replenish Atchley's supply of cigarettes and talk about an insurance policy on the life of the deceased. Of this initial conversation, Travers said:

> "Mr. Atchley brought the subject [of the homicide] up to me when he was sitting there. I was sitting there and we were talking about the policy and he brought the whole story as he told it to me exactly what happened. He voluntarily told me about it. I did not ask him about it the first time." (RT 1008).

Travers testified that prior to this initial conversation with Atchley he had not been asked by the police to interrogate him about the shooting. He also stated that the first conversation and the tape recorded one were just about the same except that he asked more questions the second time.

Following the initial conversation with Atchley, Travers informed Sheriff Spann what Atchley had told him and advised the officer that he had arranged to return later in order to secure further information from Atchley for his insurance company. In response to Spann's request Travers agreed to allow the officers to record his subsequent conversation with respondent. Travers made no threats nor offered any inducements to secure the statements made during the recorded conversation which Atchley acknowledged he understood would have to be reported to the insurance company.

REASONS FOR GRANTING WRIT

I

THIS WRIT SHOULD BE GRANTED IN ORDER TO CLARIFY RECENT AMENDMENTS TO TITLE 28, UNITED STATES CODE, SECTION 2254, WHICH WERE DESIGNED TO PREVENT THE ABUSE OF THE FEDERAL WRIT OF HABEAS CORPUS BY STATE PRISONERS.

In the instant case petitioner has parleyed the passage of eleven years and the uncertainty of a federal district court to put the People of the State of California in an impossible situation. At the pain of setting at large a convicted murderer who at one time was sentenced to death, we are compelled, long after memories have dimmed and the facts have become stale, to provide an evidentiary hearing on an issue of fact which was long ago decided by the state trial court, a uninamous state supreme court and examined by this Court.

However, it is not merely the outcome of this individual case which compels us to petition this Court to review a decision favorable to a habeas corpus petitioner. We make this petition because this is the very situation Congress intended to prevent by enacting Public Law 89-711 in 1966 which amended Title 28, United States Code, section 2254. This case is symptomatic of the problems arising from the current administration of federal habeas corpus review which fails to give effect to the intent of Congress and has led to more drastic proposals concerning the Habeas Corpus Act. We submit that the instant case provides an opportunity for this Court to resolve the current problems arising from the administration of federal

habeas corpus which, if allowed to fester, will ultimately be resolved by Congress.

In *Townsend v. Sain,* 372 U.S. 293 (1963), this Court held that the lower district courts must hold an evidentiary hearing on habeas corpus petitons filed by state prisoners where the state proceedings had not provided a full and fair evidentiary hearing on the issue. This Court announced guidelines for the lower courts to consider in determining whether an evidentiary hearing was required in a given case. Under those guidelines a hearing was necessary where: (1) the merits were not resolved in the state court proceedings; (2) the factual determinations made in the state court proceedings were not fairly supported by the record; (3) the procedure employed in the state court was inadequate to a full and fair hearing; (4) there was a substantial allegation of newly discovered evidence; (5) material facts were not adequately developed; (6) the state did not afford a full and fair hearing. *Townsend v. Sain, supra* at 313-318. Title 28, United States Code, section 2254(d) codifies most of the guidelines laid down in *Townsend v. Sain* with one notable exception, "newly discovered evidence" was specifically deleted from the conditions which a petitioner must prove to attack the presumptive validity of a state court finding.

The enactment of section 2254(d) worked a badly needed reform, one of whose purposes was to reduce the rising friction between state and federal judicial systems. *Johnson v. Florida,* 283 F.Supp. 494, 497 (S.D. Fla. 1968). The failure of the federal district

courts to give the effect to this amendment intended by Congress has led to more drastic proposals for legislative reform in this area. The "Omnibus Crime Control and Safe Streets Bill of 1968" was reported from Senate Committee with amendments to Title 28 United States Code, designed to "relieve the federal courts from the growing practice of convicted persons using habeas corpus as a substitute for direct appeal." 1968 U.S. Cong. & Adm. News, Vol. II, p. 2113. The bill contained provisions removing jurisdiction from the federal courts to reverse state cases involving admissions and confessions introduced into evidence as voluntarily given where the highest court of the state had affirmed their admission into evidence. 1968 U.S. Cong. & Adm. News, Vol. II, p. 2123. The committee report stated in pertinent part:

> "While recognizing that some issues raised in state cases do present federal questions, the committee feels that there are other legal questions heretofore deemed reviewable as a federal question that should be finally decided on the state level, free from federal interference. One of these questions is whether, as a factual matter, the confession was voluntarily given. This is a question of fact—not one of law—and should be decided on the trial level. The decision of the trial judge on the question of voluntariness is reviewed by the respective state appellate court and is generally affirmed if it is supported by substantial evidence. At this stage of the proceeding, exercise of jurisdiction by federal courts is disruptive and tends to dilute the state's enforcement of its criminal laws. To counteract this disruptive practice, title II limits federal jurisdiction to review a

state court's final decision as to voluntariness of a confession as follows:

> 'Neither the Supreme Court nor any inferior court ordained and established by Congress under Article III of the Constitution of the United States shall have jurisdiction to review or to reverse, vacate, modify, or to disturb in any way, a ruling of any trial court of any state in any criminal prosecution admitting in evidence as voluntarily made an admission or confession of an accused if such ruling has been affirmed or otherwise upheld by the highest court of the state having appellate jurisdiction of the cause.'" 1968 U.S. Cong. & Adm. News, Vol. II, p. 2138-2139.

Thus, in order to alleviate the problems created by the use of the federal habeas corpus procedures to relitigate questions which were raised at trial or on appeal the committee recommended that Congress enact legislation providing that state court decisions on the admissibility of statements be reviewed by federal courts only on appeal or by writ of certiorari. 1968 U.S. Cong. & Adm. News, Vol. II, p. 2152.

Although as enacted the "Omnibus Crime Control of Safe Streets Act of 1968" deleted these provisions, their proposal illustrates a continuing concern on the part of the Congress with federal review of state convictions. If the reforms intended by the 1966 amendments to Title 28 United States Code, section 2254, are frustrated, as they were in the instant case, then reforms along the lines purposed by Title II of the "Omnibus Crime Bill of 1968" will undoubtedly gain favor.

Title 28, United States Code, section 2254 as amended in 1966, establishes a qualified application of the doctrine of res judicata to federal habeas corpus proceedings brought by state prisoners by according a presumption of correctness to factual determinations made at a hearing on the merits in the state courts. The burden of establishing an exception to this presumed validity requires petitioner to show, by convincing evidence, that the factual determination of the state court was erroneous. 1966 U.S. Cong. & Adm. News, Vol. II pp. 3666-67.

The California Supreme Court reviewed the admissibility of Atchley's statements noting particularly Travers' testimony that no threats had been made nor any inducements offered and during the initial conversation Atchley had volunteered, without being questioned, substantially the same statements as those given in the later tape recorded conversation. At no time during the trial did Atchley contradict Travers' testimony or suggest that any of his recorded statements were untrue. The California Supreme Court found "substantial and uncontradicted evidence that no coercion occurred," *People v. Atchley,* 53 Cal.2d 160, 170-171; 346 P.2d 764, 769 (1959); even though Travers had referred to an insurance policy during the recorded conversation—a deception similar to that condemned in *Leyra v. Denno,* 347 U.S. 556 (1954)—he did so only to explain why he was asking questions and not to induce any particular responses. That court held that since there was no mental coercion comparable to that in *Leyra,* the deception itself did not render Atchley's statements inadmissible since it

was not a type reasonably likely to procure an untrue statement.

The trial court's admission of Atchley's statement over objections to its voluntariness was "A determination after a hearing on the merits of a factual issue," and thus entitled to the presumption of validity conferred by Title 28, United States Code, section 2254(d). Further, the unanimous opinion of the California Supreme Court upon the very issue being litigated herein after a full review of the trial record is likewise entitled to a presumption of validity. As Judge Barnes noted in his dissenting opinion, Appendix B, pp. 14-15, the California Supreme Court specifically recognized in their opinion that Atchley's statement would be inadmissible if made involuntarily. *People v. Atchley,* 53 Cal.2d 160 at 170-171, 346 P.2d 764 at 769. The State Supreme Court, within the meaning of 28 United States Code, section 2254(d), found that there was a hearing on the admissibility of these statements outside the presence of the jury prior to any ruling on their admissibility and that any exclusion of evidence regarding Atchley's mental condition was either harmless error or such evidence was not offered. And, the California Supreme Court found there was "substantial and uncontradicted evidence that no coercion occurred." *Ibid.*

Contrary to these specific findings of the state court which were entitled to the presumption of validity, the district court held that under the rule announced by this Court in *Jackson v. Denno,* 378 U.S. 368 (1964), there was no reliable determination on the

issue of the voluntariness of this confession. Unless the lower federal courts are compelled to detail the factual showings by which petitioners can be said to have rebutted the presumption of validity contained in 28 United States Code, section 2254(d), that presumption is meaningless and the reforms sought by that section will be frustrated.

The district court was of the opinion that the *trial court* erred in refusing to hear evidence during the in chambers hearing on the voluntariness of Atchley's statement.[3] (See Appendix A, pp. 7-9). Based upon these findings the district court held there had not been an adequate development of the material facts [§ 2254(d)(3)] which rendered the finding of voluntariness devoid of support in the record [§ 2254(d)(8)] thus rebutting the presumption of validity established by Title 28, United States Code, section 2254(d).

Most of the evidence Atchley sought to present on the issue of voluntariness at the in chambers hearing was eventually heard by the jury and was contained in the record reviewed by the California Supreme Court. That court was also confronted with the con-

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[3]The district court held the trial court erred in five instances by not receiving evidence at the in chambers hearing. Discussed individually *infra*, those instances are:

(1) that petitioner had communicated with the police his desire to have an attorney; (2) that Travers feigned sympathy for his friend and deceived him about his motives in questioning him; (3) that petitioner did not know the statement was being tape recorded; (4) what the officers had said to Travers before the tape recorded statements were elicited; and (5) what was petitioner's mental condition, his ability to read and write, and the extent of his education at the time the statements were taken.

tentions that the trial court erred in excluding evidence. Concerning Atchley's request for counsel prior to any conversation with Travers, the California Supreme Court had held that such evidence was material on the issue of voluntariness as early as 1951 [*People v. Stroble,* 36 Cal. 2d 615, 624-627, 226 P.2d 330, 336-338 (1951)]; however, in *Atchley's* case:

> "Although a refusal to permit defendant to talk to counsel suggests an intent to coerce, it seems highly improbable that either the trial judge or the jury would have inferred coercion from such a refusal alone in the light of the substantial and uncontradicted evidence that no coercion occurred." *People v. Atchley, supra,* 53 Cal.2d at 171, 346 P.2d at 770.

The California Supreme Court also directed itself to the contention of Travers' feigned sympathy and concluded:

> "In . . . [*Leyra v. Denno,* 347 U.S. 556 (1954)] the police, having promised a suspect medical treatment for an acutely painful attack of sinus, introduced as the 'doctor' a highly skilled psychiatrist with a considerable knowledge of hypnosis. . . . Although there was a similar deception in the present case, there was no comparable mental coercion. The deception itself does not render defendant's statements inadmissible, for it was not of a type reasonably likely to procure an untrue statement." *People v. Atchley, supra.*

The California Supreme Court also considered the trial court's exclusion of medical testimony as to Atchley's mental condition at the time of the shooting and concluded that no error occurred because such

evidence was never offered nor was the issue raised in the trial court. *People v. Atchley, supra,* 53 Cal.2d at 176; 346 P.2d at 773. And, if there was any error it was harmless. *People v. Atchley, supra.* Of course, considerable evidence as to Atchley's mental condition, his literacy, and the extent of his education was presented at trial and thus contained in the record reviewed by the California Supreme Court. The district court's finding of error in this regard amounts to a holding that the presumptive validity of a state court finding can be rebutted by "newly discovered evidence." As noted above, this guideline laid down in *Townsend v. Sain, supra* at 313, was specifically deleted in the enactment of Title 28 United States Code, section 2254(d), and the district court should not have invoked it.

There can be no error in the trial court's refusal to allow evidence as to whether Atchley knew his conversation with Travers was being recorded. *Lanza v. New York,* 370 U.S. 139, 143 (1962). Inmates of prisons do not have the usual array of federal and state constitutional rights guaranteed to nonincarcerated citizens, *Price v. Johnston,* 334 U.S. 266, 285 (1948); and prison authorities may subject inmates to intensive surveillance and search unimpeded by the Fourth Amendment's barrier. *Lanza v. New York, supra.*[4]

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[4]*Compare, People v. Morgan,* 197 Cal.App.2d 90, 92-94, 16 Cal.Rptr. 838, 840 (1961), *cert. denied,* 370 U.S. 965 (1962); where it was held that an electronic recording of a conversation between a country jail prisoner and his sister was not an illegal search and seizure nor an unlawful invasion of the prisoner's privacy.

The final "inadequate development of the material facts" which the district court found sufficient to overcome the presumed validity of the state court's decisions concerned the trial courts' limitation of the proposed cross-examination of the officer who requested Travers' permission to make a tape recording of any future conversations. Officer Spann was called by the prosecution prior to the introduction of the tape recording and his direct examination did not go into his conversations with Travers. Atchley requested an opportunity to cross-examine him regarding these matters prior to the introduction of the tape recording but the trial court limited the proposed cross-examination to matters covered on direct.

California and the majority of states follow the federal rule restricting cross-examination to the scope of the direct examination. Thus, the trial court properly limited the proposed cross-examination of Officer Spann. Nor did Atchley suffer any prejudice since his attorney knew he could call any of the people's witnesses as his own on direct examination and go into any matter relevant to the case.

Thus, there is no convincing evidence to support a finding that Atchley rebutted the presumed validity of either the state trial court or the state supreme court finding that his statements were voluntarily made.

II

THE FEDERAL DISTRICT COURT HAS ORDERED THE CALIFORNIA COURTS TO HOLD A HEARING IN EXCESS OF THEIR JURISDICTION.

Although the Federal District Court has the power to hold a hearing on the voluntariness of Atchley's statement, it has chosen to employ the "procedure of convenience" outlined in *Jackson v. Denno,* 378 U.S. 368 (1964). Hence, the state has been ordered to hold a hearing or suffer reversal of the prisoner's conviction.

We concur with the district court's conclusion that if a hearing upon the issue of voluntariness is necessary, it should be held in the state courts. However, Atchley's judgment of conviction has long since become final in the California courts. There is, at this time, no state court possessed of jurisdiction over this cause to hold the hearing envisioned by the district court's order. The necessary jurisdiction can be conferred upon a California court pursuant to its habeas corpus jurisdiction [Calif. Const., Art. VI, § 10], if an application is made at the instance of the petitioner. Cal. Pen. Code, § 1474. There is no procedure in California whereby the People can properly initiate such a hearing.

Attempts to do so in other jurisdictions have resulted in confusion and litigation.[5] We believe that

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[5]*Compare, Williams v. Beto,* 386 F.2d 16, 17-19 (5th Cir. 1967), where Williams claimed the findings of the state court after such a hearing were invalid because that court had acted without jurisdiction.

the procedure outlined in *Jackson v. Denno, supra,* should be understood to require the petitioner to commence the proceedings in the state courts where that is required to invest them with jurisdiction.

Regardless of the forum in which these hearings are held, they remain evidentiary hearings whose purpose is to resolve an issue raised on collateral attack. Hence, the burden of proof remains upon the prisoner whether he or the state initiates the hearing.

CONCLUSION

The question raised by this petition for certiorari concerns the underlying premise to any collateral remedy: "without a *fair* trial no person should be deprived of his liberty." "Problems of Federal Habeas Corpus," 45 F.R.D. 45, 47 (1968). The district court concluded that by present standards,[6] the hearing Atchley received in 1958 upon the issue of the voluntariness of his confession was not a "full and fair" hearing. This we submit is contrary to the purpose of Title 28 United States Code, section 2254(d) which was intended to direct the district court to consider

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[6] *Reck v. Pate,* 367 U.S. 433 (1961); *Culombe v. Connecticut,* 367 U.S. 568 (1961); *Gallegos v. Colorado,* 370 U.S. 49 (1962); and *Davis v. North Carolina,* 384 U.S. 737 (1967).

Of course these standards were the law in California at the time Atchley was tried. *See, In re Wallace,* 24 Cal.2d 923, 937, 152 P.2d 1, 3 (1944); *People v. Stroble,* 36 Cal.2d 615, 624-627, 226 P.2d 330, 336-338 (1951); *People v. Millum,* 42 Cal.2d 524, 526-528, 267 P.2d 1039, 1040 (1954); *People v. Berve,* 51 Cal.2d 286, 292, 332 P.2d 97, 100 (1958); and *People v. Speaks,* 156 Cal.App.2d 25, 36-37, 39, 319 P.2d 709, 716-719 (1957).

only if the factual determination of the state court was made at a hearing which was *fair when held.*

For the reasons expressed above, we respectfully request this Court to issue a writ of certiorari to review the opinion of the United States Court of Appeals for the Ninth Circuit.

Dated, San Francisco, California,
September 23, 1969.

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(Appendices Follow)

Appendix A

In the United States District Court
Northern District of California

No. 46688

Veron Atchley,
Petitioner,
vs.
Lawrence E. Wilson, Warden, California State Prison, San Quentin, California,
Respondent.

MEMORANDUM OF DECISION ON PETITION FOR HABEAS CORPUS

Veron Atchley brings this habeas corpus petition pursuant to 28 U.S.C. § 2241 *et seq.*, to secure his release from an allegedly unconstitutional confinement in San Quentin State Prison. After having pleaded not guilty, he was convicted of first degree murder on January 7, 1959, and was sentenced to death. The California Supreme Court affirmed the conviction and sentence, *People v. Atchley,* 53 Cal. 2d 160, 346 P.2d 764 (1959). A writ of certiorari was granted but subsequently dismissed by the United States Supreme Court as having been improvidently granted. *Atchley v. California* 366 U.S. 207 (1961). Atchley's sentence was commuted to life imprisonment without possibility of parole in 1961, and was further commuted to allow parole in 1966.

In this application, petitioner primarily raises two constitutional claims. First, he argues that the procedure employed by the trial court for determining the voluntariness of petitioner's confession failed to satisfy federal constitutional standards. Secondly, he argues that the tape-recorded confession which was extracted from him was involuntary, and hence, inadmissible. At his trial and on his automatic appeal petitioner challenged the admissibility of his tape-recorded statements. Further, he alleges that all the grounds raised in this petition were presented in a habeas corpus petition to the California Supreme Court, which was denied on January 18, 1967, apparently without opinion. Under the rule announced in *Castro v. Klinger,* 373 F.2d 847 (9th Cir. 1967), petitioner has satisfied the exhaustion of remedies requirement of 28 U.S.C. § 2254 (1958), as amended 28 U.S.C. § 2254 (1966).

On March 9, 1967, an Order to Show Cause was issued by this Court. After respondent filed his return and a hearing was held, it was determined that counsel should be appointed and that a second non-evidentiary hearing should be held after further briefing by the parties. On September 28, 1967, the further hearing was held.

The facts upon which petitioner's claims are based can be briefly summarized. At Atchley's trial for the murder of his wife, the prosecution proposed to introduce a tape recording of a conversation between Atchley and one Ray J. Travers. Defense counsel requested, and the Court granted, a preliminary exami-

nation in chambers to permit defense counsel to state his objections to the introduction of the tape-recording. In chambers, the objection was made, among others, that Atchley's statements on the tape "were not given freely and voluntarily . . . " (Reporter's Transcript, Vol. IV, p. 942, l.5 hereafter cited thusly: RT., IV, 942, l.5.) Defense counsel further objected because the defendant, when making the statements, was unaware that the conversation was being secretly recorded, or that Travers had been requested to elicit Atchley's statements by the Undersheriff, Officer Spann; the objection was also raised that "the defendant was tricked into making a declaration to his insurance broker [Travers] which he felt was a private and confidential communication to his broker concerning a policy of life insurance on the decedent; that it was not given to be transcribed or taken down." (RT., IV, 942, l. 24-943, l.3.) The tape-recording was then played, in which Atchley admitted arming himself, concealing himself, watching and waiting for his wife, surprising her and firing several shots while the gun was in his hand.

At the outset of the recording, Travers told Atchley that "I won't write none of this down. I can remember. I don't want nothing on paper." (RT., IV, 951, l. 5-8; 953, l. 4-9; 954, l. 21-23.) Among other things, Atchley stated that from the time of his arrest at approximately 4:00 a.m. on August 3, until the conversation with Travers around noon on August 5, he had been kept "pretty well occupied . . . pretty well isolated." (RT., IV, 956, l. 23-24.) Further, Atch-

ley indicated that he had been trying to get an attorney before the conversation with Travers. (RT., IV, l. 4-5.)

After the tape was finished and while still in chambers, defense counsel frequently renewed his objection that the statements elicited by Travers from Atchley constituted a confession and that they were not freely and voluntarily given. In response, the prosecutor stated that he would lay a foundation showing that the statements were freely and voluntarily given. The judge ruled that the statements on the tape "may approach the nature of a confession and that therefore before the tape is used I think the same foundation should be laid as is used for the introduction of a confession." (RT., IV, 982, l. 1-3; 986, l. 5-11.)

With this in mind, two later rulings of the trial judge in chambers are significant. Defendant raised the objection that the tape contained a communication which Atchley intended to be private between himself and Travers, made for the definite purpose of helping the decedent's children, one of whom Atchley claimed was his, to recover under the decedent's life insurance policy. The trial judge ruled that such evidence would go to the weight but not to the admissibility of the tape (RT., IV, 990, l. 4-6). Secondly, defense counsel asked to recall the Undersheriff, Officer Spann, who allegedly had asked Travers to elicit the confession from Atchley, for cross-examination. The reason given was that "since this other matter has come up [presumably the voluntariness issue] . . . it would be extremely prejudicial to the defendant's

case if I were not permitted to ask him before he [the prosecution] put the insurance agent on the stand . . . " (RT., IV, 992, l. 21-26). The Court apparently ruled that the cross-examination would be limited to matters covered on direct examination (see RT., IV, 994, l. 5-8). The officer had not been examined in connection with the tape recording when he had been called earlier by the prosecution.

In the presence of the jury, at the hearing on the issue of voluntariness,[1] Travers testified that he had visited the jail in the morning of August 5 and conversed with Atchley at Atchley's request. After that conversation, Travers admitted that he was asked by the undersheriff to engage Atchley in a second conversation which would be recorded and that he complied with the request. Travers further testified that he offered no treat, promise or inducement to Atchley.

On cross-examination, Travers acknowledged that he was a good friend and the insurance agent of Atchley. At this time defense counsel indicated that Atchley was unable to read or write, although these facts were not clearly established until later in the trial when Atchley took the stand in his own defense. It was also at this time that the trial judge in effect ruled that no constitutionally impermissible inducement could have occurred from the fact that Atchley had made his statements to Travers in the belief that

[1]An examination of the Reporter's Transcript clearly shows that both counsel and the court understood the purpose of the hearing was to determine whether the tape-recorded confession had been voluntarily given. (See RT., IV, 1002, l. 18-21; 1003, l. 8-12, l. 22-24; 1004, l. 20-22; 1005, l. 8-12, l. 13-15.)

Travers, in his capacity as insurance agent, was seeking information in order to protect the rights as beneficiaries of the decedent's children (R/T., IV, 1005, l. 13-15). Moreover, when defense counsel offered to establish that Atchley had told Travers that he had requested a lawyer on numerous occasions from the sheriff's department and that he had not been permitted to talk with a lawyer prior to that time, the prosecution objected on the ground that "whether the man wanted a lawyer, had a lawyer or intended to get one has nothing to do with the freeness and voluntariness of the statement." (R/T., IV, 1009, l. 22-25). Sustaining the objection the trial judge ruled that whether Atchley "did or did not have a lawyer has no bearing on this particular point." (R/T., IV, 1010, l. 19-22). Further, the trial judge sustained another objection to questions relating to the conversation between the undersheriff and Travers on the ground that what the undersheriff Spann "may or may not have said about this man, about what he wanted him to bring out on the tape . . ." was irrelevant (R/T., IV, 1012, l. 13-19). Finally, the Court sustained an objection on the grounds of irrelevance to the question whether or not Atchley knew that the conversation was being recorded. The tape was then played before the jury, and admitted into evidence, after the trial judge noted the objections of the defendant and stated that the court had ruled upon them.[2]

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[2]The tape was also relied upon heavily by the prosecution to impeach petitioner's testimony when he took the stand in his own behalf. (See R/T., VI, 1368, 1642, 1671, 1678-82, 1725-26, and 1758.)

After the tape had been played and admitted, Travers was further cross-examined by defense counsel. At this time he admitted that Atchley didn't have a lawyer and was trying to obtain one at the time he had made the statements which were recorded. Travers further admitted that he had been a deputy sheriff for three and one-half years, with experience in "homicides and all felonies", and that in questioning Atchley, he had followed a "general routine of asking questions, as a line of interrogation . . . " (RT., IV, 1027, l. 25-1028, l. 2).

In each ruling discussed above, the trial court excluded relevant and perhaps crucial evidence on the issue of whether the confession was voluntary. Evidence that the confession was extracted while the accused was attempting to get a lawyer, had been refused a lawyer, or merely had communicated to the police his desire to have a lawyer clearly bears on whether the confession was voluntary or whether the will of the accused was overborne. *Reck v. Pate,* 367 U.S. 433 (1961); *Culombe v. Connecticut,* 367 U.S. 568 (1961).[3] Moreover, evidence that Travers feigned sympathy for his friend, Atchley, deceived him about his motives in order to extract a confession certainly would be material to the issue. *Spano v. New York,* 360 U.S. 315 (1959); *Leyra v. Denno,* 347 U.S. 556 (1954). For the same reasons, the evidence relating to whether or not Atchley knew that the tape was being recorded would also be material. Further, the

[3]Later in the trial, Atchley testified that prior to the confession, on some ten occasions, he had told the officers he wanted an attorney. (RT., VI, 1502, l. 21-1503, l. 2; VI, 1677, l. 21-24.)

testimony of Officer Spann as to what Spann said to Travers before the tape-recorded confession was elicited could be material to a determination of voluntariness based on all the circumstances. To have limited the proposed cross-examination of Spann to those matters covered in direct examination may have deprived the judge of certain facts necessary to make a competent finding. Finally, evidence relating to Atchley's mental condition, whether he was able to read or write and the extent of his education would all bear on the voluntariness of the confession. *Culombe v. Connecticut, supra; Reck v. Pate, supra, Davis v. North Carolina,* 384 U.S. 737 (1966.)[4] While the trial court did not directly exclude evidence of this nature, the prosecution objected to one question along this line on the ground that whether the defendant could read or write didn't bear on the voluntariness of the confession and in the ensuing colloquy

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[4]Later in the trial, when Atchley took the stand in his own defense, he stated that he had attended school for two or three months a year through the third grade, and that he was unable to read or write. (RT., V, 1416, l. 8-17.) He testified that immediately after his arrest, while being questioned by the local officers, he "was in the highest shock" and on the stand testified that he was unable to remember what he had told the officers during these periods of questioning. (RT., VI, 1614, l. 1; 1615, l. 4-5; 1616, l. 8-10; 1624, l. 1-2; 1627, l. 1-2.) At another point Atchley testified that during that period immediately after his arrest, "I might have said anything to get them to quit questioning me and let me go to bed and sleep." (RT., VI, 1693, l. 9-12.) Finally, when Atchley's sentence was commuted to life imprisonment without possibility of parole in 1961, the Order of Commutation notes that Atchley possessed an I.Q. of 60 and had suffered damage to his brain and central nervous system from a blow received in 1956. (Ex. A to Petition for Habeas Corpus.) Atchley's testimony in his own defense, particularly when cross-examined by the prosecutor, reveals a subnormal level of intelligence and understanding.

the response to that question was never obtained. (See RT., IV, 1002, l. 12-1004, l. 25.)

All this is not to say that this Court is presently able to say that the confession was involuntary. However, had the trial court developed the facts discussed above and other facts,[5] resolved the conflicts and discrepancies in the evidence, and engaged in the necessary close scrutiny of the totality of the circumstances under whch the confession was extracted, (*Gallegos v. Colorado,* 370 U.S. 49, 52, 55 (1962)), then the trial court could have more competently determined whether Atchley's will was overborne.

In light of the above discussion, it is the conclusion of this Court that the trial court did not reliably determine whether Atchley's confession was voluntary or involuntary. The hearing on voluntariness was not "fully adequate to insure a reliable and clear-cut judicial determination of the voluntariness of the confession", as required by *Jackson v. Denno,* 378 U.S. 368, at 391 (1964). In that case, the Supreme Court held that the trial court procedure employed did not afford a reliable determination of the voluntariness of the confession offered in evidence, did not adequately protect Jackson's right to be free of a conviction based upon a coerced confession, and therefore would

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[5]For example, there is no indication from the record, nor was it a subject of inquiry during the hearing on voluntariness, whether the police advised Atchley of his right to remain silent, that his answers might be used against him, or of his right respecting counsel. In *Davis v. North Carolina,* 384 U.S. 737, at 740 (1966) the Supreme Court stated that such information "is a significant factor in considering the voluntariness of statements later made."

not withstand attack under the Due Process Clause of the Fourteenth Amendment. The Court therein stated, at 380, that "[a] defendant objecting to the admission of a confession is entitled to a fair hearing in which both the underlying factual issues and the voluntariness of his confession are actually and reliably determined." The Court stated that the procedure to be followed must be "fully adequate to insure a reliable and clear-cut determination of the voluntariness of the confession, including the resolution of disputed facts upon which the voluntariness issue may depend." (378 U.S. at 391.)[6]

Assuming that the trial court made an independent determination that the confession was voluntary[7] as

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[6]There appears to be no question that the rule enunciated in *Jackson v. Denno* is to be applied retroactively; that is, to convictions, such as Atchley's, which had become "final" in the sense that the ordinary methods of review, such as appeal or certiorari had already become exhausted or the right to utilize them had expired through passage of time, before *Jackson* was decided. *Linkletter v. Walker*, 381 U.S. 618, 639, n. 20 (1965); *Johnson v. New Jersey*, 384 U.S. 719, 727-28 (1966); *Pinto v. Pierce*, ... U.S. ....., 19 L.Ed. 2d 31 (1967); see Annot., "Retroactive or Merely Prospective Operation of New Rule Adopted by Court in Overruling Precedent—Federal Cases", 14 L.Ed. 2d 992, 1011-12 (1966).

[7]The record here is confusing as to exactly when the trial court made its determination that the confession was voluntary. Certainly that determination does not appear with the "unmistakable clarity" required by *Sims v. Georgia*, 385 U.S. 538, 17 L.Ed. 2d 593, at 598 (1967). Moreover, the record is clouded by the uncertainty in the trial court's statements as to whether Atchley's statements constituted a confession or merely admissions. This confusion is heightened by the fact that no instructions were given to the jury regarding the confession or the jury's role in viewing the confession. Prior to the adoption of the new Evidence Code by California, effective January 1, 1967, the failure to give appropriate instructions regarding the jury's role in viewing confessions constituted reversible error. See *People v. Bevins*, 54 C.2d 71, 76-77, 4 Cal.Rptr. 504, 351 P.2d 776 (1960).

required by *Jackson v. Denno, supra,* the fact that the hearing on the issue of voluntariness was held in front of the jury would raise no constitutional question. *Pinto v. Pierce,* ..... U.S. ....., 19 L.Ed 2d 31 (1967). However, for the reasons given above, the procedure used and the standards followed by the trial court did not satisfy the requirements of *Jackson v. Denno, supra;* see *Mitchell v. Stevens,* 353 F.2d 129 (8th Cir. 1965). As the Supreme Court stated in *Boles v. Stevenson,* 379 U.S. 43, at 45 (1964), in a case following *Jackson v. Denno,* petitioner "is entitled to a hearing in the state courts under appropriate procedures and standards designed to insure a full and adequate resolution of this issue." Accordingly, the writ of habeas corpus is granted unless the State, within a reasonable time, affords Atchley either a hearing on the issue of voluntariness which is consistent with the requirements of due process or a new trial, failing which Atchley is entitled to his release.[8] If it should be determined on a subsequent hearing that Atchley's confession was involuntary, then the State would be required to afford Atchley a new trial. *Jackson v. Denno,* 378 U.S. 368, 394 (1964). Because of this holding, the Court need not decide the other is-

[8]Alternatively, this Court concludes that, as has been shown, the trial court followed an erroneous standard of law in determining that the confession was voluntary. The remedy set forth above is still appropriate. See *Jackson v. Denno,* 378 U.S. 368, 394 n. 22 (1964). Under either theory, the Court is of the opinion that petitioner has successfully rebutted the presumption contained in 28 U.S.C. § 2254(d), as amended by Public Law 89-711, 80 Stat. 1104 (1966).

sues advanced by petitioner in his application for the writ of habeas corpus.

So Ordered.

Dated: January 19, 1968.

Robert F. Peckham,
United States District Judge.

Filed January 22, 1968,
James P. Welsh, Clerk.

Appendix B

United States Court of Appeals
for the Ninth Circuit

Lawrence E. Wilson, Warden, Appellant, vs. Veron Atchley, Appellee.	No. 22,735

[May 27, 1969]

Appeal from the United States District Court
for the Northern District of California

Before: BARNES, HAMLEY, and BROWNING, Circuit Judges

PER CURIAM:

The judgment is affirmed for the reasons stated in the district court's opinion, ... F.Supp. ..... (N.D. Calif. 1968).

BARNES, Circuit Judge, dissenting:

Appellant was a petitioning state prisoner in the court below. He had been convicted of first degree murder and sentenced to death. The California Supreme Court affirmed the conviction and sentence. (53 Cal.2d 160, 346 P.2d 764 (1959).) Certiorari to the Supreme Court of the United States was granted, and

then dismissed as improvidently granted. (366 U.S. 207 (1961).) Appellant's sentence was later commuted to life imprisonment without possibility of parole in 1961, and was further commuted to allow parole in 1966. Appellant petitioned the United States courts for a writ of habeas corpus. This was denied, without a hearing, and the denial affirmed upon the ground there was no lack of due process. *Atchley v. Dickson,* 338 F.2d 1014 (9th Cir. 1964).

This is an appeal, therefore, from a second petition for a writ of habeas corpus based on the claim (1) petitioner's confession was improperly admitted into evidence; (2) the trial court erroneously excluded evidence as to petitioner's mental condition; (3) that no hearing was held outside the jury's presence to determine the admissibility of petitioner's extra-judicial statement.

The Supreme Court of California specifically recognized the general rule of the inadmissibility of confessions, or any statement made by the accused relative to the offense charged, if made involuntarily. It passed upon the admission of appellant's "implicating statement" by stating:

> "The People contend, however, that the voluntary nature of defendant's statements was adequately shown before the recording was admitted into evidence. Travers testified that no threats were made, that no inducements were offered, and that in an earlier conversation defendant had volunteered substantially the same statements without being asked. Defendant at no time contradicted this testimony or suggested that any

of his recorded statements were untrue. Moreover the recorded conversation demonstrates that Travers referred to the insurance policy to explain why he was asking questions and not as an inducement for any particular answers. The trial court listened to the tape in chambers before ruling on its admissibility. There is therefore no merit in defendant's contention that the recording was admitted without a proper showing that his statements were made voluntarily.

"Defendant also contends that the recording was obtained by such fraud that its use as evidence was inconsistent with due process. He relies primarily on *Leyra v. Denno,* 347 U.S. 556 [74 S.Ct. 716, 98 L.Ed 948]. In that case the police, having promised a suspect medical treatment for an acutely painful attack of sinus, introduced as the 'doctor' a highly skilled psychiatrist with a considerable knowledge of hypnosis. The psychiatrist used threats, promises of leniency, and expressions of sympathy to reduce the physically exhausted suspect to almost trance-like submission. Use of his resulting confessions violated due proces, largely because they were the product of 'mental coercion.' [footnote omitted] Although there was a similar deception in the present case, there was no comparable mental coercion. The deception itself does not render defendant's statements inadmissible, for it was not a type reasonably likely to procure an untrue statement. (*People v. Connelly,* 195 Cal. 584, 597, [234 P. 374]; *People v. Castello,* 194 Cal. 595, 602 [229 P. 855].)" 52 Cal.2d 160 at 170-171.

Thus we see there was an in-chambers hearing of the tape recording, outside the presence of the jury,

prior to any ruling by the state trial judge on admissibility.

Likewise, the California Supreme Court had before it, and considered, the second error listed above—the exclusion of medical testimony as to defendant's mental condition at the time of the shooting. The court concluded this was not error because never offered or raised below. *Id.*, p. 176, Key ¶ 20. The harmless error found by the Supreme Court of California in the exclusion of certain expert opinion testimony was with respect to defendant's reflexes and memory, not to the accused's mental condition at the time of the shooting.

The California Supreme Court also found there was "substantial and uncontradicted evidence that no coercion occurred." *Id.*, p. 171.

I turn to 28 U.S.C. § 2254. Keeping in mind the findings of the California Supreme Court, I must ask, was this "a determination after a hearing on the merits of a factual issue"? I think it was. It was "made by a state court of competent jurisdiction." This was "in a proceeding in which [this] applicant for the writ and the state or an officer or agency thereof were parties." It was made in a "written opinion." It must therefore "be presumed to be correct" unless the applicant can bring himself within any one of the exclusions of 28 U.S.C. § 2254, numbered 1 to 8.

In considering these exclusions (there being no admissions by the respondent state) the burden is on the applicant to establish the exception.

With this in mind I turn to the district court findings in this case. It first determined that it was presently unable "to say that the confession was involuntary." (C.T. 73.) If the court was unable to do so, then, if I read § 2254 correctly, the applicant has not met the burden of proof required by that section.

The district court said that the state trial court did not "reliably" determine whether Atchley's confession was voluntary or involuntary, following the language of *Jackson v. Denno*, 378 U.S. 368, 391 (1964). As pointed out above, the Supreme Court of California referred to the "proper showing" made in the trial court "that his statements were made voluntarily."

It seems improper to me for a federal court, ten years after the event, after examining a record from which it cannot conclude the confession was involuntary, and without pointing out (except for general and conclusionary language) any evidence of convincing force that the confession was an involuntary act—to require an evidentiary hearing in the state courts.

Without any recital of a factual showing by the petitioner that he falls within the § 2254 exceptions, the purpose of the "showing required to offset the presumption created by the statute," is meaningless.

The legislative history of 28 U.S.C. § 2254 shows that it was passed "to prevent the abuse of the writ of habeas corpus" by state prisoners in federal courts.

> "Such purposes are to be attained by provisions for a qualified application of the doctrine of res adjudicata in Federal Court habeas corpus pro-

> ceedings brought by State prisoners by provisions according a presumption of correctness to factual determinations made at a hearing on the merits by State courts and by provisions with respect to the burden of proof in Federal court proceedings for habeas corpus by State prisoners." 1966 U. S. Cong. & Adm. News, p. 3663 at 3666.

The statute adopted by the Congress in 1966 says it places "the burden on him [petitioner] to establish by convincing evidence that the factual determination by the State court was erroneous." *Id.*, p. 3667.

I do not think that here it can fairly be stated that such "convincing evidence," existed, and I would reverse the district court's decision, and deny the petition, in an attempt to follow congressional dictates.

Appendix C

§ 2254. State custody; remedies in Federal courts.

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the

applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the fact-finding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is

produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide

such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

As amended Nov. 2, 1966, Pub.L. 89-711, § 2, 80 Stat. 1105.

Appendix D

In the Supreme Court
of the
State of California
IN BANK

Criminal No. 6450

The People of the State of California,
Plaintiff and Respondent,
vs.
Veron Atchley,
Defendant and Appellant.

OPINION

A jury found defendant guilty of murder in the first degree and fixed the penalty at death. The trial court denied his motion for a new trial and sentenced him to death. This appeal is automatic. (Pen. Code, § 1239, subd. (b).)

Defendant was born in 1917 and was reared in a mountainous community in eastern Tennessee. He attended school only through the third grade and cannot read or write anything except his name. Some time between 1943 and 1946 he moved to California and worked in various localities as an agricultural laborer and a welder. He first met the deceased, Marcella

Katherine (Farris) Atchley, when he was working near Fresno in 1953. He saw her a number of times before he left the Fresno area, and she bore a child that he claims is his. Defendant eventually entered the used car business in Palermo, California. He bought several lots, built houses on them, and lived in one of the houses with Jewel Spoon, a woman who served as his secretary and bookkeeper. He met the deceased again in 1956 when she came to buy a used car. She returned frequently and after a series of fights with Jewel Spoon moved into defendant's home with five of her children. Jewel retired to a trailer behind the house and later left town. Defendant and the deceased quarreled frequently, but late in 1957 they took a trip and were married in Georgia. They did not publicize their marriage, hoping to avoid a reduction in the aid that she and her children were receiving from the county welfare department.

During the last few days of July, 1958, Mrs. Atchley and her children moved out of defendant's home to a house in Gridley, California. Although defendant assisted in making the move, a quarrel ensued and Mrs. Atchley complained to the police. Defendant then informed welfare personnel of her marriage to him. She in turn informed the authorities that defendant had been selling used cars without a license.

On the night of August 2, 1958, Mrs. Atchley went to a dance at Robinson's Corners with her oldest daughter and a young married couple. About 12:15 a.m. she drove her daughter home and then drove the young couple to their home in Oroville.

Defendant spent that evening drinking beer with several friends, but there is no evidence that he became drunk. Some time after midnight he drove to his wife's house in Gridley and discovered that she was not there. He drove back to Palermo, looking for her at Robinson's Corners and at several taverns along the way. He then returned to Gridley and drove by her house again. Noticing that her car was still absent, he parked his car about a block away and took from a glove compartment a 22-caliber pistol loaded with six or seven bullets. He placed the pistol inside the belt of his trousers and approached the house on foot through a back alley. He then waited in the alley and in the back yard, where he could see the headlights of his wife's car when she drove in.

About 2:25 a.m. Mrs. Atchley drove up to the carport attached to one side of her house. While she was parking, defendant moved along the opposite side of the house and stood by the front corner. Mrs. Atchley walked around to the front gate and up the walk. As she neared the door, defendant stepped out towards her. In the ensuing few minutes she was shot once in the head, once in the left breast, three times under the right arm, and, according to the prosecution's experts, once in the back. Her body was later found about 3 feet from the front walk on the side opposite the point where defendant had stepped out. She was lying face down with her feet towards the walk and her head towards the carport.

Following the shooting defendant drove back to Palermo. He buried the gun in his back yard and hid the

holster in an ash can. He then went to bed, where the police found him about 4 a.m.

At the trial defendant conceded most of the foregoing facts but maintained that he had been told that his wife was going out with another man, that he had taken the gun only to scare them, and that he had no intention of killing or injuring his wife. He stated that when he saw her returning alone, he stepped out to greet her; that his shirttails were tucked in so that the gun inside his belt was clearly visible; that she seized the gun and he struggled to recover it; that the gun went off several times during the struggle; and that after he recovered it, he fired it several more times. The defense introduced much testimony that Mrs. Atchley had said she wished to kill the defendant, that she had threatened him with a gun on several occasions, and that she was a violent and combative person.

Two neighbors testified for the prosecution that they were awakened by the voice of a woman crying hysterically, "Oh, don't, don't," followed by a series of shots. Looking out their bedroom window they saw defendant in a stooping position, shooting towards the ground. Because an intervening fence obscured the body, they assumed that he was shooting at the tires on Mrs. Atchley's car. They and another neighbor, who saw defendant arrive and walk into the back alley, testified that his shirttails were out. Defendant admitted at the trial that the gun inside his belt would not have been visible had his shirttails been out. To rebut defendant's story of a struggle for the gun, the prosecution intro-

duced evidence that all of the shots were fired from such a distance that the deceased could not have been holding the gun at the time, that Mrs. Atchley was found with her keys still clutched in her right hand, and that five empty cartridge casings were found so close to each other as to indicate that the shots had been fired with the gun in approximately the same position. Other evidence indicated that defendant had threatened his wife, that she was afraid of him, and that most of the threats and all of the acts of violence attributed to her occurred during the period of her conflict with Jewel Spoon.

Defendant contends that the trial court committed prejudicial error in admitting certain evidence. He argues first that certain photographs introduced by the prosecution were gruesome in character, were unnecessary to the prosecution's case, and were offered several days before they were to be used by the expert witnesses for the sole purpose of inflaming and prejudicing the jury.

When allegedly gruesome photographs are presented, the trial court in the exercise of its judicial discretion must decide whether their probative value outweighs their possible prejudicial effect. (*People v. Brubaker, ante,* pp. 37, 48 [346 P.2d 8]; *People v. Carter,* 48 Cal.2d 737, 751 [312 P.2d 665]; *People v. Cheary,* 48 Cal.2d 301, 312 [309 P.2d 431]. In the present case some of the challenged photographs show the deceased as she was found in her front yard, with bullet holes and bloodstains on her dress and blood on her face. They were used to illustrate testimony about

her wounds and to show the relative positions in which the body and various items of evidence were discovered. Other photographs show the deceased lying on a table at the mortuary, naked above the waist, with blood smeared on her face. These pictures were used to show the location and nature of her wounds and to explain the basis for expert opinions as to the position of the gun when the shots were fired. Although many of these photographs are decidedly unpleasant to view, they are not comparable to those held inadmissible in *People v. Redston,* 139 Cal.App.2d 485, 490-491 [293 P.2d 880] or *People v. Burns,* 109 Cal. App.2d 524, 541-542 [241 P.2d 308, 242 P.2d 9], where the deceased was shown with a shaved head and disfigured by an autopsy. In view of their probative value, the trial court did not abuse its discretion by admitting them. It was also within the discretion of the trial court to permit all the pictures taken by the same photographer to be identified at the same time, even though many of them were not to be used until later in the trial.

Defendant also contends that the trial court erred in permitting the introduction of a tape recording of a conversation between defendant and his insurance broker, Ray J. Travers. The conversation took place in the interrogation room of the county jail two days after defendant had been arrested and before he had obtained a lawyer. Defendant was unaware that his words were being recorded and did not know that Travers had formerly been a police officer or that he

had agreed to question defendant so that the recording could be made. In response to Travers' questions defendant admitted arming himself, concealing himself, watching and waiting for his wife, surprising her, and firing several shots while the gun was in his hand. He maintained however, that the shooting occurred during a struggle for the gun and that he had no intention of killing the deceased. Defendant contends that these recorded statements constitute a confession and that they were made involuntarily because Travers held out as an inducement the payment to Mrs. Atchley's children of the proceeds of an insurance policy on her life. The People contend that defendant's recorded statments do not constitute a confession and were therefore admissible even if involuntary.

There has been considerable confusion as to the admissibility in a criminal proceeding of statements allegedly made by the defendant involuntarily. (See *People v. Linden,* 52 Cal.2d 1, 29, footnote 8 [338 P.2d 397].) Many opinions distinguish "confessions" and "admissions," and state that the latter are admissible without regard to their involuntary character. (*E.g., People v. Adams,* 198 Cal. 454, 465 [245 P. 821]; *People v. Fowler,* 178 Cal. 657, 664-665 [174 P. 892]; *People v. Garcia,* 124 Cal.App.2d 822, 825-826 [269 P.2d 673]; *People v. Trawick,* 78 Cal.App.2d 604, 608 [178 P.2d 45]; *People v. Cummings,* 7 Cal.App.2d 406, 408 [46 P.2d 778]; see *People v. Wolfe,* 42 Cal.2d 663, 670 [268 P.2d 475]; *People v. Ferdinand,* 194 Cal. 555, 568-569 [229 P. 341].) The distinctions between confessions

and admissions, however, are "subtle and questionable."[1] (*People v. Chessman*, 52 Cal.2d 467, 493 [341 P.2d 679].) Moreover, a number of early cases suggest that even admissions must be excluded if involuntary. (*People v. Shem Ah Fook*, 64 Cal. 380, 381, 382 [1 P. 347]; *People v. White*, 47 Cal.App. 400 401 [190 P. 821]; *People v. Harris*, 45 Cal.App. 547, 551 [188 P. 65]; *People v. Quan Gim Gow*, 23 Cal.App. 507, 510-512 [138 P. 918].) More recently, this court has stated that "the necessity for determining the voluntary character of the statement does not depend upon whether or not it constitutes a confession of guilt." (*People v. Nagle*, 25 Cal.2d 216, 222-223 [153 P.2d 344]; see *People v. Gonzales*, 24 Cal.2d 870, 874-875 [151 P.2d 251].) We have required preliminary proof of the voluntary character of statements that include "an important incriminating fact." (*People v. Nagle, supra;* see *People v. Eggers*, 30 Cal.2d 676, 689 [185 P.2d 1]; *People v. Quan Gim Gow*, 23 Cal.App. 507,

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[1]For example, in *People v. Arnold*, 108 Cal.App.2d 719 [239 P.2d 449], the defendant was charged with murdering two men, Cavness and Greenway. His statement to the police after his arrest, that he shot Greenway "because he saw me shoot Cavness" was characterized as a "statement of his reason for shooting" and held to be an admission, not a confession. In *People v. Cryder*, 90 Cal.App.2d 194 [202 P.2d 765], the defendant made an allegedly coerced confession to robbery and a subsequent statement, also allegedly coerced, that his confession was in the main correct. The latter statement was held not to be a confession. In *People v. Cronevitch*, 86 Cal.App. 646 [261 P. 309], the defendant was charged with burglarizing certain hotel rooms. After he was arrested and some of the stolen property found in his possession, he was asked when he had entered the rooms. His reply that "all the rooms were entered between two and four o'clock, as people were sound asleep at that time" was held not to be a confession.

512 [138 P. 918].) Limitation of the exclusionary rule to full confessions has been rejected not only by the foregoing opinions of this court (*People v. Eggers, supra; People v. Nagle, supra; People v. Gonzales, supra*), but also by the American Law Institute (Model Code of Evidence rule 505) and the National Conference of Commissioners on Uniform State Laws (Uniform Rule of Evidence 63 (6); see also 78 A.B.A. Rep. 134). Moreover, the Supreme Court of the United States has held that the due process clause of the Fourteenth Amendment requires exclusion of coerced admissions if they are sufficiently damaging. *Ashcraft v. Tennessee,* 327 U.S. 274 [66 S.Ct. 544, 90 L.Ed. 667]; but *cf. Stein v. New York,* 346 U.S. 156, 162-163, footnote 5 [73 S.Ct. 1077, 97 L.Ed. 1522].)

Involuntary confessions are excluded because they are untrustworthy, because it offends "the community's sense of fair play and decency" to convict a defendant by evidence extorted from him, and because exclusion serves to discourage the use of physical brutality and other undue pressures in questioning those suspected of crime. (*People v. Berve,* 51 Cal. 2d 286, 290, 293 [332 P.2d 97]; see *Watts v. Indiana,* 338 U.S. 49, 54 [69 S.Ct. 1347, 1357, 93 L.Ed. 1801]; *Lyons v. Oklahoma,* 322 U.S. 596, 605 [64 S.Ct. 1208, 88 L.Ed. 1481].) All these reasons for excluding involuntary confessions apply to involuntary admissions as well. (See *Opper v. United States,* 348 U.S. 84, 90-92 [75 S.Ct. 158, 99 L.Ed. 101]; Falknor, *The Hearsay Rule and Its Exceptions,* 2 U.C.L.A. L. Rev. 43, 68.)

Accordingly, any statement by an accused relative to the offense charged is inadmissible against him if made involuntarily.

The People contend, however, that the voluntary nature of defendant's statements was adequately shown before the recording was admitted into evidence. Travers testified that no threats were made, that no inducements were offered, and that in an earlier conversation defendant had volunteered substantially the same statements without being asked. Defendant at no time contradicted this testimony or suggested that any of his recorded statements were untrue. Moreover, the recorded conversation demonstrates that Travers referred to the insurance policy to explain why he was asking questions and not as an inducement for any particular answers. The trial court listened to the tape in chambers before ruling on its admissibility. There is therefore no merit in defendant's contention that the recording was admitted without a proper showing that his statements were made voluntarily.

Defendant also contends that the recording was obtained by such fraud that its use as evidence was inconsistent with due process. He relies primarily on *Leyra v. Denno,* 347 U.S. 556 [74 S.Ct. 716, 98 L.Ed. 948]. In that case the police, having promised a suspect medical treatment for an acutely painful attack of sinus, introduced as the "doctor" a highly skilled psychiatrist with a considerable knowledge of hypnosis. The psychiatrist used threats, promises of leniency, and expressions of sympathy to reduce the

physically exhausted suspect to almost trance-like submission. Use of his resulting confessions violated due process, largely because they were the product of "mental coercion." Although there was a similar deception in the present case, there was no comparable mental coercion. The deception itself does not render defendant's statements inadmissible, for it was not of a type reasonably likely to procure an untrue statement. (*People v. Connelly,* 195 Cal. 584, 597 [234 P. 374]; *People v. Castello,* 194 Cal. 595, 602 [229 P. 855].)

While cross-examining Travers as to the voluntariness of defendant's recorded statements, defense counsel attempted to ask whether defendant had complained to Travers of not being permitted by the police, despite numerous requests, to talk to a lawyer. The trial court sustained an objection to this question and explained to the jury that the answer would have no bearing on the question of voluntariness. Defendant correctly contends that this ruling was erroneous, but fails to show that it was prejudicial. Although a refusal to permit defendant to talk to counsel suggests an intent to coerce, it seems highly improbable that either the trial judge or the jury would have inferred coercion from such a refusal alone in the light of the substantial and uncontradicted evidence that no coercion occurred.

Defendant contends that the trial court erred in permitting the People to introduce on rebuttal a letter purportedly written by the deceased to Judge Savage two days before she was killed. The letter itemized

alleged sales of used cars made by defendant without a license, stated that defendant had threatened the deceased, and expressed her fear of him. Defendant contends that the introduction of this letter on rebuttal was prejudicial because he was unfairly surprised late in the trial and because several prosecution witnesses who could have been examined with regard to the letter and its contents had been finally discharged and could be recalled by defendant only as his own witnesses. The letter was admitted, however, with a limiting instruction, solely to show the deceased's state of mind and not to show that defendant had threatened her. It was therefore not objectionable as hearsay. (*People v. Brust,* 47 Cal.2d 776, 784-785 [306 P.2d 480]; *Adkins v. Brett,* 184 Cal. 252, 255-259 [193 P. 251].) It tended to prove her fear of defendant, which was relevant to defendant's claim that she was the aggressor in a struggle for the gun. Since the claim of self-defense was raised as part of the defendant's case, the letter was admissible in rebuttal.

Defendant contends that the trial court committed prejudicial error in refusing to order the prosecution to produce certain rent receipts and in admonishing the jury to disregard defense counsel's statement that he would prove the receipts to be forgeries. Defendant asserts that he should have been permitted to use the receipts to impeach the prosecution's witness, Barbara Farris, who testified on cross-examination that she had never forged a rent receipt for the deceased and that she had seen the deceased pay rent to defendant and defendant give receipts for it. The

question whether rent receipts had been forged to deceive the welfare authorities was clearly collateral to the issues being tried. The trial court had discretion to foreclose further inquiry along that line, even for purposes of impeachment. (See Witkin, California Evidence, § 673.) Moreover, in support of his request for the receipts, defense counsel offered to show merely that they were forged by Barbara "or someone else." Such a showing with regard to the particular receipts in question might well have been consistent with Barbara's testimony. Its value as impeachment, therefore, was questionable.

Defendant also contends that the trial court erroneously permitted the prosecution to cross-examine him improperly. The assistant district attorney asked him whether or not he had told the truth while testifying under oath in a prior and unrelated criminal proceeding. Defendant argues that this questioning was not proper impeachment and was beyond the scope of matters raised on his examination in chief. (See Pen. Code, § 1323.) On direct examination, however, defendant testified in detail as to the finances of his household, which had apparently given rise to numerous quarrels with the deceased. In particular, he stated that she had paid him no rent. In the prior proceeding he had testified that a certain check constituted payment of rent she owed him. This testimony directly contradicted the statement made by defendant on direct examination. Even though the matter was collateral to the issues being tried, the trial court had discretion to permit the defendant to be ques-

tioned for purposes of impeachment as to his own prior inconsistent statement. (See Witkin, California Evidence, § 673.)

Defendant was also asked on cross-examination to demonstrate certain aspects of his alleged struggle with his wife. He argues that this demonstration violated his privilege against self-incrimination and that it was not proper cross-examination because not restricted to matters about which he was examined in chief. Defendant testified on direct examination that he had been carrying a loaded pistol inside his belt, that his shirttails were tucked in so that the gun was plainly visible, that he had scuffled with his wife for possession of the gun, and that it had gone off during the struggle. On cross-examination he was required to put on the shirt he had worn on the night of the killing, to show how he had carried the gun, and to demonstrate with an assistant district attorney his and his wife's movements during the alleged struggle. These matters were clearly raised by his direct testimony. He was also asked how long his wife's arms were, and replied that they were about the same length as his own. He was then asked to hold the gun at arm's length pointed towards himself with a finger touching the trigger. The distance from the muzzle to his body was measured and found to be 10 inches. This part of the demonstration, in combination with the testimony of the prosecution's experts that the gun was fired from at least 24 inches away, was directly related to defendant's statement on direct examination that the gun had gone off while he and

his wife were struggling for it. The entire demonstration, therefore, was within the scope of permissible cross-examination (Pen. Code, § 1323; *People v. Ortiz*, 66 Cal.App. 154, 156 [225 P. 462]), and defendant waived his privilege against self-incrimination as to the matters involved when he voluntarily raised them on direct examination. (*People v. Arrighini*, 122 Cal. 121, 126 [54 P. 591]; *People v. Gallagher*, 100 Cal. 466, 474-476 [35 P. 80]; *People v. Withers*, 73 Cal. App.2d 58, 60-61 [165 P.2d 945].)

Defendant contends that the prosecution was guilty of prejudicial misconduct in its closing argument. The assistant district attorney suggested to the jury that the deceased had been shot initially in the back as she turned to run away. Defendant complains that this suggestion was based on facts not in evidence. There was evidence that a wound in the deceased's back marked the entrance of a bullet. From the position in which the body was found and other evidence, it clearly could be inferred that the deceased had turned to run. Although there was no evidence of the order in which she received the various wounds, the assistant district attorney's suggestion was nonetheless based on a reasonable interpretation of the evidence, and was thefore within the scope of permissible argument. (*People v. Cheary*, 48 Cal.2d 301, 317-318 [309 P.2d 431]; *People v. Burwell*, 44 Cal.2d 16, 39-40 [279 P.2d 744].)

The assistant district attorney also argued to the jury that if the prosecution's eyewitnesses were unable to see the killing from their bedroom window,

as the defense had suggested, defense counsel would have requested that the jury view the premises. The basis for defendant's objection to this argument is not clear. It is generally permissible to argue to the jury that an adverse inference should be drawn from the opposing party's failure to produce the strongest available evidence. (*Cf.* Pen. Code, § 1323.) Moreover, defense counsel had ample opportunity to respond to the argument or to point out that a countervailing inference could be drawn from the prosecution's failure to request a view.

The assistant district attorney misstated the law, however, when he told the jury that the killing of a human being while in the commission of a felony, to wit, assault with a deadly weapon, is murder of the first degree. (See Pen. Code, § 189.) Shortly thereafter he corrected his error and apologized to the jury. The court gave accurate instructions on murder and its degrees, and repeated those instructions at the jury's request shortly before the verdict was returned. It must be presumed that the jury followed the court's instructions and that defendant was not prejudiced by the assistant district attorney's earlier misstatement of the law.

The trial court instructed the jury that murder is in the first degree if perpetrated by lying in wait. (Pen. Code, § 189.) Defendant contends that the court's instructions were erroneous in that they permitted the jury to convict defendant of murder in the first degree without finding malice aforethought. The court, however, clearly defined murder in terms

of malice aforethought.[2] The next succeeding instruction differentiated the finding of murder from the determination of degree.[3] All instructions on lying in wait expressly presupposed a finding of murder.[4] Defendant's contention is therefore without merit.

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[2]"Murder is the unlawful killing of a human being with malice aforethought.

"Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

"Malice aforethought, either express or implied, is manifested by the doing of an unlawful and felonious act intentionally, deliberately, and without legal cause or excuse. It does not imply a pre-existing hatred or enmity toward the individual injured."

[3]"Murder is classified into two degrees, and if you should find the defendant guilty of murder, it will be your duty to determine the degree of the offense, whether first or second."

[4]"All murder which is perpetrated by means of lying in wait, or by any other kind of willful, deliberate and premeditated killing is murder of the first degree, and all other kinds of murder are of the second degree."

"All murder which is perpetrated by means of lying in wait is murder of the first degree.

"To constitute lying in wait, as the term is used in these instructions, a person's conduct must involve an intent to take another person unawares so as to do him bodily injury, and must include, as a means to that end, a waiting and watching for an opportune time to do the act, and also either a concealment in ambush or some other secrecy of design to take the other person by surprise.

"Lying in wait does not require any particular position of the body, or that the designing person refrain from moving about, or that he entice or trap the object of his design into any strange or puzzling situation, or that the lying in wait continue for any particular period of time, provided that its duration is such as to show a state of mind equivalent to premeditation and deliberation."

"When the killing of a human being amounts to murder and is accomplished by lying in wait, it is murder of the first degree even though there did not exist in the mind of the slayer the specific intent to kill, but it is necessary that there be the intentional inflicting of bodily injury upon the person killed under circumstances likely to cause his death."

Defendant also contends that there was insufficient evidence to justify giving an instruction on lying in wait. The elements necessary to constitute lying in wait are watching, waiting, and concealment from the person killed with the intention of inflicting bodily injury upon such person or of killing such person. (*People v. Thomas,* 41 Cal.2d 470, 473 [261 P.2d 1].) The testimony of one neighbor indicated that defendant waited behind his wife's house for over an hour. The evidence included admissions by defendant that he parked a block away to conceal his presence, that he waited behind the house for about 25 minutes, that he was watching for the headlights of his wife's car, and that he surprised her by stepping out "right into her face." From the fact that he had armed himself with a loaded pistol and the evidence indicating that he shot her almost immediately upon her arrival, the jury could reasonably conclude that he was waiting for her with the intention of shooting her and that the shooting was accomplished "by means of" his watching and waiting in concealment. There was therefore sufficient evidence to justify giving the instruction.

Defendant contends that the trial court erred in excluding certain medical testimony as to defendant's mental condition at the time of the shooting. He relies on *People v. Wells,* 33 Cal.2d 330 [202 P.2d 53], which holds that medical testimony as to mental state is admissible to show lack of malice aforethought or lack of premeditation and deliberation. In his offer of proof, however, defense counsel stated that the

proposed testimony would bear on defendant's ability at the time of the trial to remember what had occurred. There was no suggestion that it would bear on malice aforethought, premeditation, or deliberation. (*Cf. People v. Wells, supra,* at 345.) The record does not show, therefore, that evidence relevant to these issues was excluded.

Defendant did offer to elicit the doctor's opinion as to whether, in view of defendant's state of mind at the time of the shooting and after his arrest, it would be "normal" for him not to remember the details of the shooting or his statements to the police. He also proposed to ask the doctor about the reflex action of the trigger finger of a person under stress. The trial court ruled that the jury could evaluate these matters without the help of an expert. Both the mental stress created by involvement in a killing and the effect of such stress on finger reflexes, however, were "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (*People v. Cole,* 47 Cal. 2d 99, 103 [301 P.2d 854, 56 A.L.R.2d 1435]; *George v. Bekins Van & Storage Co.,* 33 Cal.2d 834, 844 [205 P.2d 1037].) As to both matters, therefore, the trial court's ruling was erroneous.

The erroneously excluded evidence was significant because defendant relied primarily on the theory that the shooting was accidental or in self-defense. Since no other witness observed the first shots, it was critical whether the jury believed his story of a struggle for the gun. The proposed testimony as to reflexes

might have served to render that story more credible by providing an explanation of why so many shots were fired and why defendant continued to shoot after recovering possession of the gun. The proposed testimony as to defendant's inability to remember might have served to make defendant appear more truthful by rebutting the prosecution's suggestion that he was lying about his memory.

Upon examination of all the evidence, however, it does not appear that the erroneous exclusion of this medical testimony resulted in a miscarriage of justice. (See Cal. Const., art. VI, § 4½.) Although the testimony as to reflexes might have made defendant's story of a struggle more credible, there was abundant evidence inconsistent with a struggle, including the distance from which the shots were apparently fired, the proximity in which the five empty cartridge casings were found, the fact that defendant had armed himself and waited for his wife, the cry heard by the neighbors, and the fact that virtually every bullet in defendant's gun entered her body. Although the testimony as to defendant's inability to remember might have met one line of attack on his credibility, other lines of attack were given far more emphasis by the prosecution. Defendant was shown to have lied repeatedly to the police after his arrest and to have lied under oath in a prior criminal proceeding. Moreover, his credibility was important primarily as it affected the jury's belief in his story of a struggle for the gun. The evidence inconsistent with that story was abundant and convincing. There is therefore

no reasonable probability that admission of the excluded medical testimony would have persuaded the jury to reach a different result. (See *People v. Watson*, 46 Cal.2d 818, 836 [299 P.2d 243].)

The judgment and order denying a new trial are affirmed.

Traynor J.

Gibson, C.J., Schauer, J., Spence, J., McComb, J., Peters, J., and White, J., concurred.

Appellant's petition for a rehearing was denied December 30, 1959.

Filed, December 1, 1959,
William I. Sullivan, Clerk.